ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

BELLSOUTH'S REPLY COMMENTS

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

Richard Sbaratta
Jonathan B. Banks

Their Attorneys

BellSouth Telecommunications
Suite 4300
675 West Peachtree Street
Atlanta, GA 30375-0001
(404) 335-0738

Date: April 30, 2001

I. INTRODUCTION AND SUMMARY

The Comments submitted in this proceeding can be divided into two main camps. In one camp are the large IXCs. The other camp counts as its members facilities-based CLECs and ILECs.

The IXCs seek to impose UNE price regulation on already competitive special access services contrary to Commission practice and the explicit terms of the *Supplemental Order Clarification*. They argue that the Commission has no choice but to make UNEs available to substitute for purely special access services, regardless of the consequences. This would allow IXCs to convert existing ILEC special access circuits to UNEs and to force CLEC special access prices to artificial TELRIC levels. In essence, the IXCs are looking to impose a new regime of government price-setting on all "local access providers (be they ILEC or CLEC) that charge more than their underlying costs to unaffiliated interexchange carriers."[1] This call for a broad new regime of intrusive government price-setting is unaccompanied by any of the evidence or economic analysis called for by the *Public Notice*. There is no basis in law, fact or policy for this new regime of government-set prices.

In contrast, neither facilities-based CLECs nor ILECs support the unrestricted availability of UNEs for special access. ILECs argue that the high-capacity facilities used to provide special access circuits do not meet the requirements of section 251(d)(2), and thus cannot be made available as UNEs. In contrast to all the other parties, the ILECs submitted detailed factual evidence bearing on the impairment test. In addition, ILECs have submitted a detailed economic analysis of special access services in further

[1] Sprint n.2 at 2.

support of their position.[2] No party has called into question the factual evidence submitted by the ILECs in this proceeding.

The facilities-based CLECs also oppose the IXC quest to obtain special access UNEs. Time Warner argues that the Commission should "establish as a permanent rule the restrictions on the availability of UNEs to provide access set forth in the *Supplemental Order* in this proceeding."[3] The Joint CLEC Commenters, including E.spire, KMC, Winstar and XO (Joint CLEC Commenters),[4] and ALTS would also retain the basic local usage requirements in the *Supplemental Order Clarification* ("*SOC*"), but modify the requirements in particular ways. Although these commenters raise issues with the procedures for converting special access circuits to UNEs, these issues hardly support any notion that the *SOC* approach is unworkable. For example, one CLEC finds BellSouth's processes for converting special access circuits "usable and reasonable."[5] Indeed, BellSouth has converted 3,326 special access circuits to UNEs under the *SOC* standards. There is no backlog of circuits awaiting conversion in the BellSouth region.

If the Commission is to decide this proceeding on the facts, then it must decide that carriers are not impaired in providing high-capacity special access services without UNEs. Special access services and customers represent a discrete group of services and

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2 Crandall Reply Declaration, Attachment to USTA's Reply Comments, filed in this same proceeding on this same date ("*Crandall Declaration*").

3 Time Warner at 2.

4 The full list of the CLECs submitting Joint Comments is: Cbeyond; E.spire; KMC; Net2000; Winstar and XO.

5 Focal at 4.

customers.[6] CLECs now operate over 600 local fiber network facilities in the top 150 MSAs to provide these services and serve these customers.[7] In fact, CLECs account for 36 percent of special access revenues. The facts about the substantial degree of competition to provide special access services have been on the record in this proceeding since at least January, 2000, when the first Special Access Fact Report was filed.[8] No carrier has provided any substantive facts to the contrary.

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6 Crandall Declaration at 4.

7 *Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport*, Attachment to USTA's Comments, Dkt. No. 96-98 (filed April 5, 2001)("*Special Access Fact Report*").

8 USTA submitted a similar special access fact report last year in an earlier round of pleadings in this proceeding. P. Huber and E. Leo, *Special Access Fact Report*, Submitted by the United States Telecom Association, Prepared for Bell Atlantic, BellSouth, GTE, SBC, and U S WEST, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (FCC filed Jan. 19, 2000)(2000 *Special Access Fact Report*). No party has taken issue with the accuracy of the *2000 Special Access Fact Report*'s factual description of CLEC local fiber facilities or the other facts provided relative to an impairment analysis of special access services.

II. WITHOUT A SPECIFIC FINDING THAT CARRIERS ARE IMPAIRED IN OFFERING SPECIAL ACCESS SERVICES, THERE IS NO LEGAL BASIS FOR SPECIAL ACCESS UNEs

The IXCs claim that the Commission is without legal authority even to analyze whether carriers are impaired in offering special access services.[9] They argue next that even if a service-specific analysis were to be done, the impairment findings in the *UNE Remand Order* regarding local exchange service must dictate the result for special access because the "same" ILEC network provides both services. Both propositions are nonsense.

Instead of providing any substantive evidence on impairment, the IXCs have chosen to rely solely on legal arguments. This tactical choice – simply refusing to put forward evidence on their own local fiber networks and success in providing service (AT&T and WorldCom operate what are likely to be the two broadest CLEC local fiber networks) – suggests that whatever evidence that the IXCs could muster would show, in fact, that they are not impaired without UNEs. Their tactical choice leaves the record bare of evidence to support any impairment finding relating to special access.

The IXC arguments fail for several reasons. First, a service specific analysis is contemplated by the statute and Commission practice. Section 251(d)(2) requires the Commission to measure impairment against the "services [a carrier] seeks to offer." To argue that a service-specific analysis violates the terms of section 251(d)(2) when the explicit language requires consideration of the "services" a carrier seeks to offer is silly.[10]

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[9] WorldCom at 8.

[10] BellSouth Comments at 23-24; Time Warner Comments at 4-5. At least equally silly is WorldCom's argument that if the Commission conducts any service-specific analysis, it will have to conduct so many separate analyses – one for every imaginable telecommunications service -- that starting down the road leads to disaster. WorldCom at

The Commission has also engaged in service specific UNE analysis before. In the *UNE Remand Order* the Commission held that section 251(d)(2) permits consideration of "the particular types of customers that the carrier seeks to serve."[11] The *SOC* discusses the distinction the Commission drew between residential and small businesses and larger businesses in its unbundling analysis of circuit switching.[12] That distinction reflected the greater availability of CLEC alternatives for business switching. The Commission concluded that ports on a circuit switch would be unbundled to serve smaller businesses and residential customers, but not to serve larger businesses.

The Commission's unbundling analysis of packet switching also reached service-specific conclusions that are also directly applicable to this proceeding. "[C]ompetitors

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10-12. The distinction between special access services (and high-capacity transport) is recognized in the market and in dozens of years of Commission regulation. Recognizing the distinction between these two services hardly requires separate analysis of every imaginable telecommunications service. In fact, the Commission traditionally groups similar services into a single set for economic analysis. *See, e.g., In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 and 96-61, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756, at 15782-15784, ¶¶ 40-44 (1997). Past Commission analysis supports separate economic analysis of the services larger businesses order, such as special access, and the services residential customers order, without requiring separate analysis of each and every service available to either group. Time Warner Comments at 4-8. Similarly, the *UNE Remand Order* analyzed whether carriers were impaired in offering switching services to two broad groups, larger businesses and mass market customers. The Commission's analysis properly grouped dozens of switched-based services in the analysis. Thus, the Commission did not conduct separate analyses of impairment relating to call waiting, call forwarding and other switch-based vertical features.

[11] *UNE Remand Order* at ¶ 81.

[12] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*") ("*SOC*") n. 40 at ¶ 8, 12.

are actively deploying facilities used to provide advanced services to serve certain segments of the market – namely, medium and large business – and hence they cannot be said to be impaired in their ability to offer service, at least to these segments without access to the incumbent's facilities."[13] This service-specific analysis is directly applicable to the impairment analysis for special access because special access services, like advanced services, are a separate set of services supplied to a separate set of medium and larger business customers.

The case for a service-specific analysis of special access services is, in fact, stronger, than the case for the service-specific unbundling analyses the Commission has already engaged in because, as the *SOC* points out, special access services occupy a "different legal category" from local exchange service. The *SOC* makes it very clear that the *UNE Remand Order* did not focus on special access services,[14] as a direct reading of that order also makes clear.[15] WorldCom's and AT&T's arguments to the contrary are based on the all-or-nothing approach to unbundling adopted in the *Local Competition Order*. That approach was founded on a misreading of the "technically feasible" language in section 251(c)(3) of the Act. The Supreme Court overturned the Commission's misreading of that language. The *SOC* explains the Court's ruling and

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13 *UNE Remand Order* at ¶ 306.

14 *SOC* at ¶ 13.

15 BellSouth Comments at 26-28. Of course, if the two markets are not "inextricable interrelated," then the UNE Remand Order impairment finding cannot apply to special access. In that case, this proceeding will not be revisiting the UNE Remand Order findings too early, as some commenters complain, rather it will be engaged in a first analysis of whether carriers are impaired in offering special access services without UNEs.

why the Commission's earlier approach can no longer control analysis under section 251(d)(2).[16]

Against all the evidence, the IXCs next claim that local exchange services and special access services are "inextricably interrelated" so that a finding of impairment regarding local services compels the same finding for special access services.[17] The Crandall Declaration and the Special Access Fact Report refute this bald claim. Time Warner states that "special access service (along with private line service) constitutes a distinct and separate product market."[18] After careful economic analysis, Crandall reaches the same conclusion: special access services are distinct from local exchange services for purposes of any impairment analysis.[19]

The Crandall Declaration illustrates several important distinctions between special access and local exchange services, as described below. These differences show why the *UNE Remand Order's* impairment analysis for local exchange service cannot be translated to special access services.[20] One key fact that highlights the difference between special access services and local exchange services is that special access

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16 At ¶ 12 ("Now that the Supreme Court has rejected our previous interpretation of [section 251(d)(2)] as insufficiently rigorous, it is appropriate for us to revisit the issue").

17 *See* Comments of Sprint at 3-4; Comments of Global Crossing at 3-4; Comments of AT&T at 6.

18 Time Warner at 4. Time Warner also provides a detailed analysis of the differences between the service. Time Warner at 4-9.

19 Crandall Declaration at 11; BellSouth Comments at 18-20.

20 BellSouth's Comments walk through the specific application of the *UNE Remand Order's* unbundling analysis to special access and the differences between that analysis and the analysis of unbundling for local exchange services. BellSouth Comments at 24-29.

customers spend roughly *thirty* times what non-special access customers spend on telecommunications services. As might be expected, these intensive users of telecommunications services are fewer in number, more concentrated geographically and buy more sophisticated services delivered over different facilities.

- The customers that buy high-capacity special access services are very different from those that do not buy those access.[21] Customers that buy special access services are much larger and spend much more money on telecommunications.[22] For example, based on survey data, high-capacity users have an average sales volume of roughly $500 million per year versus roughly $15 million per year for non users. The mean number of employees of high-cap users is about 7,166 versus 2,500 for non users. The weight-adjusted average annual telecommunications expenditures of high capacity special access users ($45,088) is roughly *thirty* times larger than that of non users ($1,673).[23]

- There are many fewer special access customers than local exchange service customers. Based on survey data, Crandall estimates that roughly six percent of businesses have a special access type connection.[24]

- Special access customers are far more geographically concentrated than local exchange service customers.[25] This concentration is also a key fact because it "generates the opportunities for large economies of density" that may not be present in serving the

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21 BellSouth Comments at 18-20.

22 Crandall Declaration Table 2 at 13.

23 Crandall Declaration at 14.

24 Crandall Declaration n.38 at 21.

25 Crandall Declaration at 14-15.

entire mass market for local exchange service.[26] WorldCom grudgingly concedes that special access customers are "somewhat concentrated."[27]

• Not only are the customer groups different, the services they buy are different and are delivered over different facilities. Special access customers buy high-speed (DS1 and higher capacity) services and facilities to transmit large amounts of voice and data traffic.[28] WorldCom concedes that CLECs that provide special access delivered over very high-capacity SONET facilities may not be impaired without UNEs.[29] Many special access customers maintain corporate voice and data networks linking widely dispersed corporate locations. At least in BellSouth's region, mass market local exchange service customers do not maintain private networks. As Time Warner notes, "[p]urchasers of special access, which are IXCs and large businesses, typically demand different types of telecommunications services (*e.g.* ISDN or extensive voice mail systems) that are not desired by residential or small business end users. Also, one of the key reasons that large businesses purchase special access is that they have sufficient traffic volume to make special access cost-effective. This is not the case with purchasers of switched access."[30]

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26 Crandall Declaration at 14.

27 WorldCom at 18. Given the facts, this concession is somewhat of understatement. Twenty percent of BellSouth's wire centers account for just over ninety percent of BellSouth's special access revenues. A longstanding business rule of thumb is that 20 percent of customers may account for 80 percent of revenues. *Special Access Fact Report* at 3. Special access revenue concentration substantially exceeds that rule. BellSouth has about 1,600 wire centers in its region. WorldCom could comfortably ignore 1,280 of those centers, collocate in or bypass completely the remaining 320, and be positioned to compete for over 90 percent of BellSouth's special access revenue.

28 Crandall Declaration at 8-11.

29 WorldCom at 16.

30 Time Warner at 7 (citations omitted).

The IXCs also argue that the *UNE Remand Order's* finding of impairment for local exchange service dictates the same result for special access services because ILEC local exchange and special access service "depend on the use of the same loop and transport plant."[31] The Commission, however, has already held that ports on the same switch may be UNEs or not, depending on whether they serve larger businesses or mass market customers. So, this IXC argument does not hold water even if the exact same facilities were used. In any event, even the IXCs concede that the actual plant facilities may be different when it comes to special access and local exchange service: "residential and many small businesses" use switched access and common transport while "larger business customers often have dedicated lines."[32] Because the facilities used to deliver special access services are different,[33] this IXC argument predicated on the same facilities being used must be rejected.[34]

Finally, WorldCom argues that if a carrier requires the use of UNEs to gain connectivity to a particular end user location, such facilities are required regardless of the service to be offered. In essence, that if a CLEC would be impaired in reaching a customer location to provide local service, it would be impaired in providing special

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31 Sprint at 3; AT&T at 1.

32 Sprint Comments at 3.

33 BellSouth Comments at 19.

34 If by "same" plant, the IXCs mean that BellSouth, for example, owns the network elements used to provide both local exchange and special access service, the argument is meaningless. It would lead to unbundling of every network element if any one met the impair test. Even WorldCom admits that unbundling analysis under section 251(d)(2) must at least consider impairment on a facility-by-facility basis. WorldCom at 10.

access service to that location as well.[35] This argument misses the entire point. The Special Access Fact Report, the Crandall Declaration and BellSouth's Comments all show that, based on the facts and economic analysis, CLECs are *not* impaired in reaching special access customer locations or providing dedicated high-capacity facilities. To these customers and between POPs and central offices, CLECs can provide their own high-capacity facilities (or procure facilities from wholesalers or other CLECs) and provide a variety of services over those facilities.

III. COMPETITIVE POLICY AND STATE UNIVERSAL SERVICE MECHANISMS FURTHER BUTTRESS THE CONCLUSION THAT UNES SHOULD NOT BE AVAILABLE FOR SPECIAL ACCESS SERVICES

UNEs should not be available to substitute for special access services for at least two independent policy reasons, even if the Commission were to conclude that carriers could be impaired otherwise.[36] First, blanket unbundling will reduce ILEC and CLEC incentives to invest in new facilities. As Time Warner points out:

> there is at least one class of services that CLECs are successfully providing over their own facilities where it cannot be argued that they are exploiting a market failure: special access....If true competitive alternatives to the ILECs are ever going to develop, this is precisely the market in which the Commission should *not* intervene to lower prices artificially.[37]

The Crandall Declaration makes the same point:

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35 WorldCom at 10.

36 The Commission held in the *UNE Remand Order* that in considering whether to unbundle particular network elements under section 251(d)(2), it should consider policy issues, including the effect of unbundling on facilities-based CLECs. *UNE Remand Order* at ¶¶104, 110-12.

37 Time Warner at 2. See also, AT&T v. Iowa Utilities Board, 525 U.S. 366,429 (1999) (Breyer, J., dissenting in part & concerning in part ("It is in the unshared, not the shared, portions of the enterprise that meaningful competition would likely emerge").

> The significant and growing facilities-based competition for special access services demonstrates that CLECs are not impaired without access to incumbent LEC loop and transport UNEs to provide special access services. But this proceeding is about more than the impairment test. Encouraged by Commission regulatory policies, like expanded interconnection, and lured by the attractive economics of the special access market, dozens of CLECs and third party wholesalers have invested in their own special access facilities. If the Commission allows UNEs to displace special access services, further deployment of competitive facilities will be severely inhibited. Moreover, those CLECs that have taken the risk of investing their own facilities will be punished.[38]

Finally, allowing UNEs to be substituted for special access (and private line services) would upend *state* universal service funding mechanism. These state funding mechanisms are separate from *federal* mechanisms,[39] and often depend on implicit subsidies in intrastate special access and dedicated private line charges.[40]

IV. CONCLUSION

Because CLECs have succeeded in building over 600 local fiber networks in the country's top 150 MSAs, and are using these networks to deliver a very substantial volume of special access services, all without reliance on special access UNEs, the Commission cannot find that CLECs are impaired without high-capacity UNEs to deliver special access services. Economic analysis shows that CLECs could easily extend their current networks to reach the great majority of remaining special access customers. Policy considerations also counsel against UNE regulation here. As Time Warner

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[38] Crandall Declaration at 35.

[39] The IXCs focus their universal service arguments on purely federal funding mechanisms, attempting to ignore the fact that it is *state* funding that would be jeopardized by expanding the availability of UNEs in this proceeding. *See* AT&T at 4-5.

[40] Preserving state universal support mechanisms would alone justify restrictions on the availability of UNEs for special access services. BellSouth Comments at 31-34.

observes "regulatory prescription down to TELRIC-based prices would likely lead to less facilities-based competition, less efficient pricing over time, and the continued need for regulation."[41] Even should the Commission conclude that UNEs could be made available for special access services, their availability should be closely linked to the provision of local exchange service, as they are under the *SOC*.

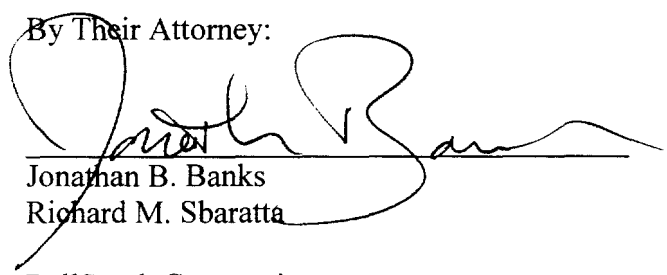
Echoing Time Warner's Comments quoted above, the Commission should follow the course it has laid down for network elements like packet switching where, as in special access services, significant CLEC facilities deployment occurred without UNEs.

> we are mindful that regulatory action should not alter the successful deployment of advanced [and special access] services that has occurred to date. Our decision to decline to unbundle ... therefore reflects our concern that we not stifle burgeoning competition in the advanced [and special access] service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.[42]

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

By Their Attorney:



Jonathan B. Banks
Richard M. Sbaratta

BellSouth Corporation
1133 21st Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-4182

Dated: April 30, 2001

41 Time Warner at 2.

42 *UNE Remand Order* at ¶ 316.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 30th day of April 2001 served the parties of record to this action with a copy of the foregoing **BELLSOUTH'S REPLY COMMENTS** by hand delivery and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

Anthony V. Jones

SERVICE LIST CC DOCKET NO. 96-98

Jonathan Askin
Kimberly M. Kirby
Association for Local Telecommunications Svcs.
888 17th Street, N. W.
Washington, D.C. 20006

Mark C. Rosenblum
Richard H. Rubin
AT&T Corporation
295 North Maple Avenue
Basking Ridge, NJ 07920

Peter D. Keisler
James P. Young
C. Frederick Beckner III
AT&T Corporation
Sidney & Austin
1722 I Street, N. W.
Washington, D.C. 20006

Russell M. Blau
Joshua M. Bobeck
El Paso Networks, LLC
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N. W., Suite 300
Washington, D. C. 20007-5116

Richard Metzger
Pamela Arluk
Focal Communications Corporation
7799 Leesburg Pike, Suite 850 North
Falls Church, VA 22043

Margot Smiley Humphrey
National Rural Association
Holland & Knight
2099 Pennsylvania Avenue
Suite 100
Washington, D. C. 20006

Richard A. Askoff
Colin Sandy
National Exchange Carrier Assoc., Inc.
80 South Jefferson Road
Whippany, NJ 07981

L. Marie Guillory
Daniel Mitchell
National Telephone Cooperative Assc.
4121 Wilson Blvd., 10th Floor
Arlington, VA 22203

Stuart Polikoff
Organization for The Promotion and
Advancement of Small Tele. Companies
21 Dupont Circle, N.W.
Suite 700
Washington, D. C. 20036

Gerard J. Duffy
Western Alliance
Blooston, Mordkofsky, Dickens,
Duff & Prendergast
2120 L Street, N. W., Suite 300
Washington, D. C. 20037

Margot Smiley Humphrey
TDS Telecommunications Corp.
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D. C. 20006

Lawrence E. Sarjeant
Linda L. Kent, Keith Townsend
John W. Hunter, Julie E. Rones
United States Telecom Assc.
1401 H Street, HW, Suite 600
Washington, D.C. 20005-2164

Erik J. Cecil
BroadRiver Communications Corp.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N. W.
Suite 200
Washington, D. C. 20006-3458

Sharon J. Devine
Robert B McKenna
Suite 700
1020 19th Street, N. W.
Washington, D. C. 20036

Thomas Jones
Renee Callahan
Christi Shewman
Time Warner Telecom
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N. W.
Washington, D. C. 20036

Joe D. Edge
Tina M. Pidgeon
General Communications, Inc.
Drinker Biddle & Reath LLP
1500 K Street, N. W., Suite 1100
Washington, D. C. 20005

Melissa E. Newman
Qwest
1020 Nineteenth Street, N. W.
Suite 700
Washington, D. C. 20036

Lawrence G. Malone
Brian P. Ossias
Public Service Commission of
The State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Gary L. Phillips
Roger K. Toppins
Paul K. Mancini
SBC Communications, Inc.
1401 Eye Street, N.W., Suite 1100
Washington, D. C. 20005

Jeffrey S. Linder
Wiley, Rein & Fielding
1776 K Street, N. W.
Washington, D. C. 20006

Michael E. Glover
Edward Shakin
Verizon Telephone Companies
1320 North Court House Road
8th Floor
Arlington, Virginia 22201

Chuck Goldfarb
Henry G. Hultquist
Alan Buzacott
WorldCom, Inc.
1133 19th Street, N. W.
Washington, D. C. 20006

Brad E. Mutschelknaus
Jonathan E. Canis
Ross A. Buntrock
Joint Commenters
Kelly Drye & Warren LLP
1200 19th Street, N.W.
Washington, D. C. 20036

Carol Ann Bischoff
Jonathan D. Lee
Competitive Telecommunications Assc.
1900 M Street, N. W., Suite 800
Washington, D. C. 20036

Robert J. Aamoth
Todd D. Daubert
Competitive Telecommunications Assc.
Kelley Drye & Warren LLP
1200 19th Street, N. W., Suite 500
Washington, D. C. 20036

Lawrence R. Freedman
Norlight Telecommunications, Inc.
Fleischman & Walsh, LLP
1400 16th Street, N. W., 6th Floor
Washington, D. C. 20006

+Maglie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals, 445 Twelfth Street, S. W.
TW-A325
Washington, D. C. 20554

+International Transcription Service
The Portals, 445 Twelfth Street, S. W.
Suite CY-B400
Washington, D. C. 20054

Michael J. Shortley, III
John S. Morabito
Global Crossing North America, Inc.
180 South Clinton Avenue
Rochester, New York 14646

Leon Kestenbaum
Jay Keithley
Richard Juhnke
Sprint Corporation
409 9th Street, N. W., #400
Washington, D. C 20004